REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA **MAIN DIVISION, WINDHOEK**

JUDGMENT

Case no: I 2486/2011

In the matter between:

DESMOND AMUNYELA **PLAINTIFF**

and

AROVIN PROPERTY DEVELOPERS (PTY) LTD **DEFENDANT**

Neutral citation: *Amunyela v Arovin Property Developers* (I 2486/2011) [2013] NAHCMD 146 (31 May 2013)

Coram: MILLER AJ
Heard: 28 May 2013
Delivered: 31 May 2013

ORDER

The application is dismissed with costs, which shall include the costs of one instructing and two instructed counsel. The defendant must file its next pleading within 20 court days calculated from the date of this order.

JUDGMENT

MILLER AJ :

[1] This is an application brought at the instance of the defendant in the main action to compel the respondent (the plaintiff in the main action) to furnish certain requested further particulars to his amended particulars of claim. I shall continue to refer to the parties as the plaintiff and the defendant respectively.

[2] The defendant is represented by Mr. Totemeyer SC together with Ms. van der Westhuizen. The plaintiff is represented by Mr. Frank SC together with Mr. Rukoro.

[3] It is convenient to quote the amended particulars of claim in full.

'AMENDED PARTICULARS OF CLAIM

1. The PLAINTIFF is DESMOND AMUNYELA, a major male Businessman with his address at Nr. 86B Amasoniet Street, Eros Park, Windhoek, Republic of Namibia.
2. The DEFENDANT is AROVIN PROPERTY DEVELOPERS (PTY) LTD, a Company duly registered in terms of the laws of the Republic of Namibia with its business at Nr. 51 Lazarett Street, Southern Industria, Windhoek, Republic of Namibia.
3. On 10 March 2011 the defendant acknowledged its liability to pay the plaintiff in the amount of N$2.1 million as the final settlement for the plaintiff's consultancy work done on behalf of the defendant. A copy of the aforesaid acknowledgement is attached hereto marked "A".
4.

4.1 The aforesaid acknowledgement does not correctly record the agreement between the parties in that it does not correctly reflect the parties thereto by not stating that it was signed by VA Sorenson on behalf of the defendant and that plaintiff was intended to be the undersigned referred to.

4.2 The incorrect description of the signatories to the said acknowledgement was occasioned by a common error of the parties who signed the acknowledgement in the *bona fide* but mistaken belief that it recorded the true agreement between the parties.

4.3 In the premises plaintiff is entitled to have the said acknowledgement rectified to reflect the above-mentioned capacities of the signatories thereto.

5. In terms of the aforesaid deed of acknowledgment the defendant pledged to pay an amount of N$700,000.00 during March 2011 and to pay the remaining balance of N$1.4 million on or before the end of July 2011.
6. The defendant paid the aforesaid amount of N$700,000.00 by paying two separate amounts of N$350,000.00 on the 11th of March 2011 totaling N$700,000.00.
7. The defendant failed to pay an amount of N$1.4 million by the end of July 2011.
8. In the premises the defendant is liable to pay to the plaintiff an amount of N$1.4 million.

WHEREFORE plaintiff claims against the defendant:

1. An order rectifying the acknowledgment of liability signed by the parties by inserting the word *"For and on behalf of the company"* immediately above the signature of VA Sorenson and by the insertion of the word *"Undersigned"* immediately above the signature of DD Amunyela.
2. Payment of the amount of N$1,400,000.00
3. Interest on the aforesaid amount at the rate of 20% per annum from date of payment to date of judgment.
4. Further and/or alternative relief.
5. Costs of suit.

DATED AT WINDHOEK ON THIS 8TH DAY OF OCTOBER 2012.'

[4] The defendant's thereupon filed a request for further particulars relating to paragraph 3 and paragraph 6 of the amended particulars of claim.

[5] As far as paragraph 3 is concerned the defendant sought further particulars relating to the nature of the consultancy work allegedly done details as to when and where it was done, whether there was a contractual basis for the work to be done and the total value or amount of the work done.

[6] In respect of paragraph 6 the defendant sought particulars as to when where and how payment was made as well as the identities of the parties concerned with the payments.

[7] To this request the plaintiff responded as follows:

'1.

Ad paragraph 1 thereof

Plaintiff's claim is based on the acknowledgment of defendant. The underlying cause for the acknowledgment is irrelevant to plaintiff's claim and is in the personal knowledge of defendant. The particulars sought are thus not necessary for defendant to enable him to plead.

2.

Ad paragraph 2 thereof

Defendant is referred to paragraph 29 of his affidavit opposing summary judgment where he admits payment of N$700,000.00 to plaintiff and the information sought accordingly falls within his personal knowledge. The particulars sought are thus not necessary for defendant to enable him to plead.'

[8] This response or the defendant's perceived lack of a proper response to put it more correctly prompted the present application.

[9] Rule 21(1) of the Rules of this Court reads as follows:

"(1) A party may before delivering a pleading in answer to a pleading delivered to him or her and for the purpose of enabling him or her to plead thereto or to tender an amount in settlement, deliver a notice within 15 days of receipt of such pleading or of the delivery of a notice of intention to defend as the case may be, calling for only such particulars as may be, strictly necessary for either purpose aforesaid." (my emphasis).

[10] The underlined words in the context of Rule 21(1) substantially limits the scope and ambit of what may be requested and what must be furnished.

[11] Mr. Frank referred me to the judgment in ***SA Railways and Harbours v Deal Enterprises (Pty) Ltd*** 1975(3) SA 944 (W) at D during the course of which Botha J formulated the following principles:

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1. The function of particular of plaintiff’s particulars of claim or declaration, at the pleading stage, is to fill in the picture of the plaintiff’s cause of action, to limit the generality of the allegations therein, and to define with greater precision the issues which are to be tried; the purpose of such particulars is to enable the defendant to plead or to tender an amount in settlement. (Curtis-Setchell, Lloyd and Matthews v Koeppen, 1948 (3) SA 1024 (W) at p. 1027; Samuels and Another v William Dunn & Co. S.A. (Pty) Ltd., 1949 (1) SA 1149 (T) at pp. 1158, 1159, Tahan v Griffiths, 1950 (3) SA 899 (O) at pp. 902 - 3; White v Moffett Building & Contracting (Pty.) Ltd., 1952 (3) SA 307 (O) at pp. 311 – 2; Rule 18 (4); Rule 21 (1), and cf. Rule 21 (4); Van Tonder v Western Credit Ltd., 1966 (1) SA 189 (C) at p. 195A - B – D; Gibbs and Others v Allen and Others, NN.O., 1973 (1) SA 351 (E) at pp. 354 - 5).

2. Whereas formerly a plaintiff was obliged to furnish such particulars as were “reasonably necessary” to enable the defendant to plead or tender, the position is now that such particulars only are required to be furnished as are “strictly necessary” for either of the said purposes; the new Rule has restricted the scope of a request for particulars to “absolute essentials”. (Rule 21 (1); Van Tonder, supra at p. 195B – C; Rondalia Versekeringskorporasie van SA Bpk. v Mavundla, 1969 (2) SA 23 (N) at pp. 26 in fin – 27 top; Cete v Standard & General Insurance Co. Ltd., 1973 (4) SA 349 (W) at p. 353A – D).

3. No hard and fast rules can be laid down as to the degree of particularity that is required, the Court exercises its discretion upon the facts of each case; and the decision in one case is no safe guide to the solution of another unless the relevant facts are identical.

   (White, supra at p. 315G – H, Erasmus v Venter, 1953 (3) SA 828 (O) at p. 830D - E; Bantry Head Investments (Pty.) Ltd. and Another v Murray & Stewart (Cape Town) (Pty.) Ltd., 1974 (2) SA 386 (C) at pp. 398 in fin – 399A).

4. A defendant seeking an order for further particulars to be supplied must satisfy the Court that without such particulars he will be embarrassed in pleading; he must show that the plaintiff has failed to deliver particulars “sufficiently” in terms of what is required, i.e. that particulars are lacking which are strictly necessary to enable him to

plead or to tender. This he can do by relying only upon the terms of the plaintiff's pleadings as such, but it is also open to him to adduce evidence on affidavit of matters extraneous to the pleadings in order to explain the cause of his embarrassment; outside evidence, however, may be used only for the purpose of satisfying the Court that particulars are required within the ambit of the general principles applicable, and not for the purpose of extending the scope of the particulars required in terms of those principles.

(Curtis-Setchell, supra at p. 1028; Samuels, supra at 9. 1156; Erasmus, supra at p. 833A – D; Rule 21 (6); Mavundla, supra at p. 27A; Gibbs, supra at pp. 353C – 354C).

5. A defendant is not entitled to know the plaintiff's evidence, as opposed to the outline of the case which is being brought against him. He is not entitled to information simply because it would be useful to him. In particular, he is not entitled to be supplied with information which forms no part of the plaintiff's cause of action as formulated, or which relates to matters extraneous to the *facta probanda* put forward by the plaintiff himself, for the purpose of enabling him to ascertain whether he has a defence to the claim, or to formulate such a defence.

   (Curtis-Setchell, supra at p. 1028; Samuels, supra at 9. 1156 – 1160; Van Tonder supra at p. 195D – G; Gibbs, supra at pp. 355C - 356G; Elvinco Plastic Products (Pty.) Ltd. v Grotto Steel Construction (Pty.) Ltd., 1974 (3) SA 676 (C) at pp. 678F – G, 679A – B, F, 680C-E).

6. If a defendant is entitled to particulars in accordance with the abovementioned principles, the plaintiff cannot avoid the obligation of furnishing them and thus incorporating them in the pleadings, by stating that the relevant information is in the possession of the defendant, or available to the defendant from other sources.

   (Samuels, supra at p. 1157; Tahan, supra at pp. 905A – 906A; Mavundla, supra at p. 30G – H; Bantry Head Investments, supra at p. 7 394G-H).

7. The procedure relating to particulars has been much abused for many years and it is still being abused.

(Samuels, supra at p. 1101; Erasmus, supra at p. 837E; Purdon v Muller, 1961 (2) SA 211 (AD) at pp. 214H – 215H; Rule 21 (7); Moaki v Reckitt & Colman (Africa) Ltd. and Another, 1968 (3) SA 98 (AD) at p. 102C; Cete, supra at p. 351F – H).'

[12] Mr. Totemeyer submitted that the introduction of the Judicial Case Management System in this Court has the effect, *inter alia*, for more openness and disclosure, and that the judgment by Botha J should be considered with that in mind. He submitted further that the authorities relied on by Mr. Frank are founded in a true adversarial system which no longer applies in this Court.

[13] He consequently urged me to consider those authorities with a degree of circumspection.

[14] It is correct to say that with the introduction of judicial case management some of the holy cows of a true adversarial system became diluted or were done away with. The purpose of judicial case management always is to expedite the judicial process and to identify and isolate the real disputes between the parties.

[15] If anything in my view judicial case management fortifies the confining nature of Rule 21(1) rather than militate against it. Requests for further particulars which are not strictly necessary, serve only to delay the proceedings.

[16] The principles formulated by Botha J apply a fortion in the present system of judicial case management.

[17] I turn to consider the factual issue whether or not the particulars requested are strictly necessary to enable the defendant to plead. The consideration whether or not the particulars requested are strictly necessary to tender an amount in settlement does not apply. Put differently the question is whether the refusal by the plaintiff to furnish the particulars has as its result that the defendant is embarrassed in pleading its defence to its claim.

[18] Mr. Totemeyer, correctly stated that a party in possession of an acknowledgement of debt arising from an underlying set of facts which in itself will support a claim is entitled to sue either on the acknowledgment of debt itself or on the underlying cause of action which gave rise to the former. Mr. Totemeyer is also correct in saying, and in this he is supported by Mr. Frank that in cases where the acknowledgment is a novotion or a compromise of the underlying cause of action only the acknowledgment of debt may be sued upon.

[19] There was some debate before me as to whether the acknowledgment of debt *in casu* is a compromise or not. I consider it unnecessary to determine that issue.

[20] I have no doubt that on the pleadings as they stand, the plaintiff's case is founded on the acknowledgment of debt and not on the underlying cause relating to the consulting work that was done. Apart from the fact that the plaintiff says so in express terms a reading of the pleadings as a whole makes that abundantly clear. The facts concerning the consultancy work are *facta probantia* to which the defendant is not in law entitled to further particulars.

[21] Faced with the fact that the defendant is confronted with a document in which it is alleged it had acknowledged its indebtedness to the plaintiff it can not in any manner complain that it embarrassed in pleading to that allegation. The defences open to the defendant and there may well be several, can be pleaded with relative ease.

[22] I need say little about the further particulars requested in relation to the payment of N$700,000.00. It is already at this stage common cause that the defendant paid that amount to the plaintiff and the allegation that it was in fact paid need not embarrass the defendant in pleading thereto.

[23] In the result I make the following orders:

1. The application is dismissed with costs, which shall include the costs of one instructing and two instructed counsel.

2. The defendant must file its next pleading within 20 court days calculated from the date of this order.

P J MILLER

Judge

APPEARANCES

PLAINTIFF: T Frank SC (with him S Rukoro)
Instructed by Sisa Namandje & Company

DEFENDANT: R TÖTEMEYER SC (with him CE van der Westhuizen)
Instructed by Koep & Partners

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